PP v. MUHAMAD IZWAN ROSDAN

HIGH COURT MALAYA, SHAH ALAM
NURULHUDA NURAINI MOHAMAD NOR JC
[CRIMINAL APPEAL NO: BA-41H-47-04-2021]
19 DECEMBER 2022

Abstract – *There needs to be more sufficient evidence adduced to prove that the accused is driving in a dangerous manner, as s. 41 of the Road Transport Act 1987 carries serious repercussions that an offender shall be sentenced to a minimum imprisonment of two years and be disqualified from holding or obtaining a driving licence for a period with a minimum of three years. If it can be suggested that both the accused and the deceased had driven in an equally dangerous manner, the charge ought to be amended to one under s. 43 instead, which is driving in a careless and inconsiderate manner.*

ROAD TRAFFIC: *Reckless driving – Accident – Collision of vehicles – Causing death of deceased – Whether accused drove in dangerous manner when overtaking another vehicle – Whether original charge under s. 41(1) of Road Transport Act 1987 correctly amended to one under s. 43 – Whether accused drove in careless and inconsiderate manner – Whether sentence passed adequate*

The accused was initially charged with driving a car in a dangerous manner under s. 41(1) of the Road Transport Act 1987 ('Act'), resulting in the death of the deceased, who was driving another car. The Magistrate, despite making a finding that the accused in fact was overtaking another vehicle as the debris of the collision was found on the deceased's lane thus the accused was in the deceased's right of way, had amended the original charge to s. 43 of the Act as the only evidence proved by the prosecution was that an accident had happened when the accused collided into the deceased causing his death, and this itself being insufficient to prove driving in a reckless or dangerous manner under s. 41. Hence, the accused was called to enter his defence on an amended charge of s. 43 of the Act. The accused pleaded guilty to the said amended charge and was sentenced to a fine of RM4,500 in default six months imprisonment. Dissatisfied with the decision, the prosecution lodged a notice of appeal. The issues that arose were (i) whether the accused was driving in a dangerous manner when he had overtaken a vehicle at a double line road and collided into the deceased's car or whether the accused was overtaking a vehicle at the right spot and the deceased had come out from the junction without a proper lookout in a vehicle without its lights on, had caused the collision with the accused; and (ii) whether the sentence passed was grossly inadequate.

Held (dismissing appeal):

(1) The police report P3 lodged by the accused did not state the material point of his defence that the car light of the deceased was not on but the other significant point that the deceased had suddenly come out from the lane onto the main road was reflected in P3. The accused should not be penalised for failing to state this defence in his police report as he still had the opportunity to suggest or explain further in his statement taken during the investigation. The fact that the accused's statement was taken was confirmed by SP4. However, the failure to investigate this by SP3 and SP4 had caused a gap in the prosecution's case as unless this version was refuted by showing either, firstly this defence was never suggested at all by the accused during the investigation and secondly, even if suggested, the fact remained that the version by the accused could not have been probable, the end result was that there was doubt if the accused by overtaking another vehicle and collided into the deceased was, in that way, driving dangerously. (paras 12 & 15)

(2) The sketch plan P12 showed a double line on the road until nearer to the junction where there were dotted dashed lines. The point of impact marked as 'X' by SP4 suggested where the collision happened. The marking of dotted dashed lines on the road meant a vehicle was allowed to overtake when the situation of the traffic permitted and this right to overtake, was what the accused had exercised at that material time. The photographs taken and tendered were not clearly explained by SP4 with photographs appearing to show a double line and double dotted or dashed lines all described as 'lokasi kemalangan' but no further elaboration on this relevant fact to give rise to an inference that the accused was driving in a dangerous manner when he committed wrong under the law by overtaking at an unpermitted part of the road. Hence, it was not safe for this court to make a mathematical calculation and infer that the accused had overtaken a vehicle at a double line road resulting in the accused driving in a dangerous manner that ended with a collision with the deceased, and having regard to the nature, condition and size of the road, and the amount of traffic which was or might be expected to be on the road. (paras 16, 17 & 19)

(3) Section 41, if convicted, carries a serious repercussion that an offender shall be sentenced to a minimum imprisonment of two years and be disqualified from holding or obtaining a driving licence for a period with minimum of three years. More evidence must be adduced to show that the accused was driving in a dangerous manner. Although on the one hand there was suggestion that the accused could be said to be driving dangerously when overtaking on the face of oncoming traffic or overtaking when unable to see clearly, case law equally suggested that a person who turn into the side road without stopping to give way,

especially when the deceased, who was in a small route making a turning into a main road, could equally be said to be driving in a dangerous manner. Thus, the Magistrate had come to a correct decision in amending the charge as permitted by s. 41(4) of the Act, to one under s. 43 driving in a careless and inconsiderate manner. (paras 20-22)

(4) As the sentence, having considered that the accused had a probable defence and the fact that the incident happened in 2013 but the charge was only proffered in 2019, the provision of s. 43 at the material time was 'fine of not less than RM4,000 and not more than RM10,000 and can be imprisoned for not more than 12 months.' The Magistrate had passed a fine of RM4,500 in default six months imprisonment with the license to be endorsed with this said conviction, the accused being a first-time offender. The sentence passed by the Magistrate was not manifestly inadequate and the Magistrate in passing the sentence, had applied the correct sentencing principle, had taken into consideration the element of public interest and at the same time balancing it with the interest of the accused. (paras 23 & 24)

Case(s) referred to:
Ahmad Najib Aris v. PP [2009] 2 CLJ 800 FC ***(refd)***
Herchun Singh & Ors v. PP [1969] 1 LNS 52 FC ***(refd)***
Lim Chin Poh v. PP [1969]1 LNS 92 HC ***(refd)***
PP v. Ong Kia Chian [2006] 4 CLJ 334 HC ***(refd)***
Ramiah v. PP [1972] 1 LNS 120 HC ***(refd)***

Legislation referred to:
Road Transport Act 1987, ss. 41(1), (4), 43
Road Traffic Ordinance 1958, s. 34A

For the prosecution - Mohd Shahrul Ekhsan; DPP
For the respondent - Aqeeb Lizalman Nordin Zamry; M/s Aqeeb & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Nurulhuda Nuraini Mohamad Nor JC:

Background

[1] The accused respondent was initially charged in the year 2019 with driving a Proton Satria number WVM 9776 on 15 April 2013, in a dangerous manner under s. 41(1) of the Road Transport Act 1987, resulting in the death of Mageswaran a/l Paramasiban. The deceased was in a Kancil car number WHF 4127.

[2] The charge reads as follows:

A Bahawa kamu pada 15.4.2013 jam lebih kurang 5.30 pagi di KM 36 Jalan Klang Banting-Port Dickson dalam Daerah Kuala Langat, dalam Negeri Selangor sebagai pemandu motokar no. WVM 9776 didapati telah memandu kenderaan tersebut di atas jalanraya secara merbahaya tanpa mengendahkan suasana dalam keadaan (bentuk-bentuk, kegunaan jalan dan juga kesibukan di atas jalanraya yang boleh dijangkakan) sehingga
B menyebabkan kematian kepada pemandu motokar no. WHF 4127 bernama Mageswaran a/l Paramasiban (No. K/P 781123-10-5633). Oleh yang demikian itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 41(1) Akta Pengangkutan Jalan 1987.

[3] The learned Magistrate, after hearing all the four prosecution
C witnesses, came to a view that a different offence was proven under s. 43, hence the respondent was called to enter his defence on an amended charge of s. 43.

[4] The respondent pleaded guilty to the said amended charge and was sentenced to a fine of RM4,500 in default six months imprisonment. The
D license endorsed with the said conviction. The prosecution not being satisfied with the decision, had lodged a notice of appeal against that said decision. When the matter came up for hearing before this court, the prosecution put up an oral submission whilst the respondent a written one.

Issues Before The Magistrate's Court

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[5] There were no eyewitnesses to the incident. The Magistrate observed that there were two versions of the incident: one by the IO who said that the respondent had encroached onto the rightful lane of the deceased and had caused this accident. The defence's version was that the respondent accused
F was overtaking a vehicle before he came to the said junction when the deceased who was in a car but with no lights on, turned into the big road from the said junction and collided into the respondent. This version appears in the police report lodged by the respondent tendered as P3.

[6] The learned Magistrate, despite making a finding that the accused
G respondent in fact was overtaking another vehicle as the debris of the collision was found on the deceased's lane thus the accused respondent was in the deceased's right of way, the basis in amending the original charge to s. 43 by the trial judge was that the only evidence proven by the prosecution was that an accident had happened when the accused collided into the
H deceased causing his death, and this itself being insufficient to prove driving in a reckless or dangerous manner under s. 41.

[7] This deduction can be attributed to the summarised evidences adduced in the prosecution case as found by the learned Magistrate below:

I (i) The accused respondent was driving his Satria travelling from Banting moving towards Klang whilst overtaking a car, collided into the deceased in Kancil who was on the opposite side;

(ii) SP2, brother of the deceased who went to the scene at about 5.30am said the deceased who worked in the morning shift was on his way to work using the Jalan Kenanga route and would come to this junction before going into the main road Banting-Klang;

(iii) There were not many cars on the street taken by the deceased that morning that would lead to the main road;

(iv) The street was lighted with a lamp post at the end junction but SP2 agreed that the light was glim which was similarly said by the IO SP4;

(v) The PUSPAKOM officer SP3 examined both the vehicles brought to him after the incident and found both the cars were damaged on the right side of each cars but did not check if the lights of the vehicles could function or otherwise;

(vi) The IO, SP4 said it was a straightforward case of face-to-face collision that happened when the accused was overtaking a vehicle on the road where the deceased has the right of way;

(vii) However, the Magistrate found that the IO did not investigate the version put by the respondent as per the respondent's police report P3 that the deceased was coming out from the Jalan Kenanga street into the main road Banting-Klang;

(viii) P3 represent the version said by the accused that had taken place where the accused said the deceased came out from the said junction into the main road;

(ix) From the cross-examinations, it was suggested by the accused that the collision occurred because the deceased had made a turn into the main road at the junction with the car light not on;

(x) Neither SP3 (PUSPAKOM) nor the IO SP4 had made any investigations on this;

(xi) The main road which is a federal road with a speed limit of between 60 to 70km/hr, is divided by a double line as per the sketch plan P12;

(xii) The cause of death of the deceased was "polytrauma secondary to motor vehicle accident".

[8] In amending the said charge, the learned Magistrate availed itself with the relevant authorities, although a repetition, a necessity to reproduce them here:

(i) In *Lim Chin Poh v. PP* [1969] 1 LNS 92 where the meaning of the word "driving in a dangerous manner" to mean:

> In my opinion the expression driving in a manner which is dangerous to the public indicates some dangerous act or manoeuvre on the part of the driver of a vehicle, *eg*, **overtaking a vehicle on the wrong side of it, or overtaking in the face of**

A **oncoming traffic** or **overtaking when unable to see oncoming traffic,** or crossing a junction against traffic light and so on. There must be some positive act on the part of the driver which is dangerous having regard to all circumstance. (emphasis added)

(ii) In *PP v. Ong Kia Chian* [2006] 4 CLJ 334 Low Hop Bing J elaborated
B further as follows:

In a case of dangerous driving, the prosecution must establish that:

a) **a situation created by the accused is dangerous *eg*, turning right into the side road without stopping to give way to through traffic**; and

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b) when creating such a situation the accused was at fault. Fault involves a failure; a failing below the care and skill of a competent and experienced driver in relation to the manner of driving and the relevant circumstances (per Raja Azlan Shah) in *Ramiah v. Public Prosecutor* [1972] 1 LNS 120. (emphasis added)

D (iii) In *Ramiah v. PP* [1972] 1 LNS 120, Raja Azlan Shah J in discussing s. 34A of the Road Traffic Ordinance 1958, which is in *pari materia* with s. 41(1) of the RTA, explained further the necessary relevant evidence for an offence under s. 41 as follows:

E It is not the law under s. 34A of the Road Traffic Ordinance *that merely because an accident had happened and a person had been killed, danger had in that sense arisen and therefore it must follow, as the night, the day, that the appellant was driving in a manner dangerous to the public.*

... In a case under s. 34A, two things must be established. First, there must be a situation created by the accused which, viewed
F objectively, is dangerous. Dangerous driving is not defined in the Road Traffic Ordinance and it is up to the Court to come to a decision on the evidence ...

Secondly, the prosecution must prove that when creating such a situation the appellant must be at fault. "Fault involves a failure;
G a failing below the care and skill of a competent and experienced driver, in relation to the manner of driving and to the relevant circumstances".

The Observations By This Court

H **[9]** The critical issue here is whether the accused respondent was driving in a dangerous manner when he had overtaken a vehicle at a double line road and collided into the deceased's car or whether the accused was overtaking a vehicle at the right spot and the deceased had come out from the junction without a proper lookout in a vehicle without its lights on, had caused the collision with the accused.

I **[10]** The learned Magistrate was of the view that the prosecution had merely proven an accident happened face on with the deceased, with the accused being on the deceased's right of way but the Magistrate did not

address other available evidence on this issue clearly in his judgment. This leaves this court with the task to re-evaluate the evidence and make the necessary findings (see: *Ahmad Najib Aris v. PP* [2009] 2 CLJ 800 (Federal Court).

[11] As stated in the earlier paragraph, in the sketch plan P12, the roads heading from Klang to Morib and from Morib to Klang are divided in the middle road by a double line. But, dotted dashed lines can be seen located near the centre of the junction. This logically so to permit cars coming out from the small lane of Jalan Kenanga into the main road of Klang-Morib and for cars on the main road making a turn into the small lanes.

[12] The police report P3 lodged by the accused did not state the material point of his defence that the car light of the deceased was not on but the other significant point that the deceased had suddenly come out from the lane into the main road is reflected in P3. The critical point that the deceased was driving without the car lights on was suggested to SP3 and SP4 (IO) in cross-examination. No investigation was carried out by SP3 and SP4 on both this aspect as in P3 and the suggested defence.

[13] The prosecution did not ask why there was no investigation carried out neither did the IO SP4 said anything to the effect that the accused's statement did not disclose this important defence hence suggesting a belated defence.

[14] As to the police report P3 that did not contain the other vital defence suggesting that the deceased was equally to be blamed for driving in an unlighted vehicle, *Herchun Singh & Ors v. PP* [1969] 1 LNS 52; [1969] 2 MLJ 206 (Federal Court) where it was ruled that a police report is not meant to be encyclopaedic:

> … the first information report is not an encyclopaedia. It is not the beginning and ending of every case. It is only a complaint to set the affairs of law and order in motion. It is only of the investigation stage that all the details can be gathered and filled up.

[15] Thus, to this court's view, the accused respondent should not be penalised for failing to state this defence in his police report as he still has the opportunity to suggest or explain further in his statement taken during the investigation. The fact that the respondent's statement was taken was confirmed by SP4. However, the failure to investigate this by SP3 and SP4 had caused a gap in the prosecution's case as unless this version is refuted by showing either, firstly this defence was never suggested at all by the accused during the investigation and secondly, even if suggested, the fact remained that the version by the accused could not have been probable, the end result is that there is doubt if the accused by overtaking another vehicle and collided into the deceased was, in that way driving dangerously.

[16] As highlighted earlier, the sketch plan P12 shows a double line on the road until nearer to the junction where there are dotted dashed lines. The point of impact marked as "X" by SP4 suggests where the collision happened. The marking of dotted dashed lines on the road means a vehicle is allowed to overtake when the situation of the traffic permits and this right to overtake, was what the accused had exercised at that material time.

[17] The photographs taken and tendered as P6(A-N) were not clearly explained by SP4 with photographs P6(D-F) appears to show double line and double dotted or dashed lines all described as "lokasi kemalangan" but no further elaboration on this relevant fact to give rise to an inference that the accused respondent was driving in a dangerous manner when he committed a wrong under the law by overtaking at an unpermitted part of the road.

[18] Looking at P12, a deduction can be made that the drawing of the sketch plan was not done according to actual measures as one can note that the dotted or dashed lines appears to stretch longer if one turns right from the said Jalan Kenanga lane into the main road but there was no measurement made to show how long the exact stretch of this dotted dashed lines are, even before reaching the junction to Jalan Kenanga, from Banting-Klang route, the route the accused respondent was travelling on.

[19] Hence, for this court to make a mathematical calculation and infer that the accused had overtaken a vehicle at a double line road resulting in the accused respondent driving in a dangerous manner that ended with a collision with the deceased, and having regard to the nature, condition and size of the road, and the amount of traffic which is or might be expected to be on the road, to this court's view is not safe.

[20] Section 41 of the RTA, if convicted carries a serious repercussion that an offender shall be sentenced to a minimum imprisonment of two years and be disqualified from holding or obtaining a driving licence for a period with minimum of three years. Relying on the authorities cited above, more evidence must be adduced to show that the accused respondent was driving in a dangerous manner. To recap, at the time of the incident about 5am in the morning, the big amount of traffic on the road at that time was negated by the prosecution witnesses themselves SP2 and SP4.

[21] The authorities referred to by the learned Magistrate highlighted in this judgment, although on one hand suggest that the accused could be said to be driving dangerously when overtaking on the face of oncoming traffic or overtaking when unable to see clearly, case law equally suggest that a person who turn into the side road without stopping to give way, especially when the deceased who was in a small route making a turning into a main road, can equally be said to be driving in a dangerous manner.

[22] For all these reasons, this court is of the view that the learned Magistrate had come to a correct decision in amending the charge as permitted by s. 41(4) of the RTA, to one under s. 43 driving in a careless and inconsiderate manner.

Whether Sentence Passed Grossly Inadequate

[23] As to the sentence, having considered that the accused respondent has a probable defence and the fact that the incident happened in 2013 but the charge was only proffered in 2019 (based on the case number at the lower court BG-83-117-02-2019), the provision of s. 43 at the material time was "fine of not less than RM4,000 and not more than RM10,000 and can be imprisoned for not more than 12 months". The learned Magistrate had passed a fine of RM4,500 in default six months imprisonment with the license to be endorsed with this said conviction, the accused being a first-time offender.

[24] The sentence passed by the learned Magistrate is not manifestly inadequate and the Magistrate in passing the sentence, had applied the correct sentencing principle. The learned Magistrate had taken into consideration the element of public interest and at the same time balance it with the interest of the accused. For these reasons, the appeal against sentence is also dismissed.